

greater sentence. A prosecutor who considers all of the factors in these standards is in the best position to avoid such a miscarriage of justice.

Part VI: Trial

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1. Candor With The Court

6-1.1 False Statement

A prosecutor shall not knowingly make a false statement of fact or law to a court. If a prosecutor learns that a previous statement of material fact or law made to the court by the prosecutor is incorrect, the prosecutor shall correct such misstatement in a timely manner.

6-1.2 Legal Authority

A prosecutor shall inform the court of legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to his or her position.

6-1.3 False Evidence

A prosecutor shall not offer evidence that the prosecutor knows to be false. If a prosecutor learns that material evidence previously presented by the prosecutor is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence.

6-1.4 Ex Parte Proceeding

A prosecutor, in an ex parte proceeding authorized by law, shall inform the court of all material facts known to the prosecutor which he or she reasonably believes are necessary to an informed decision by the court.

Commentary

In order to make just, informed decisions, the court must have the most accurate information available regarding the facts and the law. A prosecutor, in his or her role as a minister of justice, must provide information to the court in an honest and forthright manner.

2. Selection of Jurors

6-2.1 Investigation

A prosecutor may conduct a pre-voir dire investigation of any prospective juror, but any such investigation shall not harass or intimidate prospective jurors. Prosecutors may conduct criminal history record checks of prospective jurors and, to the extent required by law or court order, share any conviction information with the court or defense for use in conducting the voir dire examination.

6-2.2 Voir dire Examination

A prosecutor should not (a) conduct voir dire examination in such a manner as to cause any prospective juror unnecessary embarrassment; or (b) intentionally use the voir dire process to present information that he or she knows will not be admissible at trial.

6-2.3 Peremptory Challenges

A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law.

6-2.4 Duration

A prosecutor should conduct selection of the jury without unnecessary delay.

6-2.5 Identity of Jurors

In cases where probable cause exists to believe that jurors may be subjected to threats of physical or emotional harm, the prosecutor may request the trial court to keep their identities from the defendant or the public in general.

Commentary

The primary purpose of the jury selection process is to empanel a jury that is representative of the community and does not have personal interests or prejudices for or against a party to the extent that they cannot render a verdict based upon the law and the facts. The standards set forth principles to be followed by prosecutors in conducting their part of the selection process.

In the permitted voir dire examination, consideration might be given to the court approved use of a questionnaire to gather basic information and serve as a time saving device.

In exercising peremptory challenges, the prosecutor should be mindful that as a representative of all of the people of his or her jurisdiction, it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group.

The standard recognizes that in recent years jurors have sometimes been subjected to threats of violence. It recognizes the need to protect such jurors and adopts a probable

cause test for cases in which the prosecution may request the court to keep their identity from the defendant and the public.

3. Relations with Jury

6-3.1 Direct Communication

A prosecutor should not intentionally speak to or communicate with any juror or prospective juror prior to or during the trial of a case, except while in the courtroom with all parties and the judge present and on the record.

6-3.2 After Discharge

After the jury is discharged, the prosecutor may, unless otherwise prohibited by law, communicate with the jury as a whole or with any members of the jury to discuss the verdict and the evidence. In jurisdictions where permitted, the prosecutor may ask the court to inform jurors that it is not improper to discuss the case with the lawyers in the case after verdict, if the juror decides to do so. The prosecutor should not criticize the verdict, harass any juror, or intentionally seek to influence future jury service during such communication. A prosecutor should cease communication upon a juror's request.

Commentary

The prosecutor has a large responsibility in seeing that the criminal justice system is respected and improved. In that regard he or she must be careful to avoid any appearance of taking unfair advantage of a juror or jury. In post trial contact, the prosecutor should not criticize the verdict or jurors' actions, as such might be seen as an attempt to influence the behavior of a juror or a person with whom the juror confides in any future instance of jury service.

4. Opening Statements

6-4.1 Purpose

When permitted by law, a prosecutor may give an opening statement for the purpose of explaining the legal and factual issues, the evidence, and the procedures of the particular trial.

6-4.2 Limits

A prosecutor should not allude to evidence unless he or she believes, in good faith, that such evidence will be available and admitted into evidence at the trial.

Commentary

The prosecutor should be guided by the principle that the opening statement should be confined to assertions of fact that he or she intends or, in good faith, expects to prove. Although it may be acceptable for the prosecuting attorney to state facts that are expected to be proved, such assertions should be founded upon the prosecutor's good faith and reasonable basis for believing that such evidence will be tendered and admitted into

evidence. The prosecutor should be zealous in maintaining the propriety and fairness which should characterize his or her conduct as an officer of the court whose duty it is to competently represent the citizenry of the state in seeking justice. So long as the prosecutor's remarks are guided by good faith and a reasonable belief that such assertions will ultimately be supported by the admissible evidence, the prosecution will have fulfilled the basic requirements of an opening statement.

5. Presentation of Evidence

6-5.1 Admissibility

A prosecutor should not mention or display, in the presence of the jury, any testimony or exhibit which the prosecutor does not have a good faith belief will be admitted into evidence.

6-5.2 Questionable Admissibility

A prosecutor, when anticipating the use of testimony or exhibits of questionable admissibility, should endeavor to obtain a ruling on the admissibility of the testimony or exhibit prior to mentioning or displaying the same before the jury.

Commentary

Consistent with the concepts of fairness that should be embraced by the prosecutor, he or she should not expose the jury to evidence of questionable admissibility without first seeking a ruling from the court.

6. Examination of Witnesses

6-6.1 Fair Examination

A prosecutor should conduct the examination of all witnesses fairly and with due regard for their reasonable privacy.

6-6.2 Improper Questioning

A prosecutor should not ask a question that implies the existence of a factual predicate that the prosecutor either knows to be untrue or has no reasonable objective basis for believing is true.

6-6.3 Purpose of Cross-Examination

A prosecutor should use cross-examination as a good faith quest for the ascertainment of the truth.

6-6.4 Impeachment and Credibility

A prosecutor should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine, or hold a fact witness up to contempt, if the prosecutor knows the witness is testifying truthfully.

Commentary

If the criminal justice system is to retain credibility with the public, it must furnish a tribunal into which people can come to give information without the fear of being harassed or having their privacy unduly invaded. Our system requires that all witnesses, those brought in by both the prosecution and defense, be treated fairly. To ask a question that implies the existence of a factual predicate that is not true or for which the prosecutor has no reasonable objective basis for believing, is not fair and therefore not proper. Without such limitations, the overzealous prosecutor could use the examination of a witness to imply the existence of whatever evidence might be needed in the hope that the jury would not consider too closely the fact that it was never really introduced.

Because cross-examination is to be used as a good faith quest for the truth, a prosecutor who knows the witness is testifying truthfully should not attempt to ridicule, discredit, or undermine said witness. That does not mean that the prosecutor cannot cross-examine. The use of proactive techniques can elicit other information that is useful in establishing the prosecution's theory of the case.

In the end, if a prosecutor keeps in mind that his or her responsibility is to seek justice for all of the people of the community, then following the directives of these standards is simply a matter of common sense.

7. Objections and Motions

6-7.1 Procedure

When making an objection during the course of a trial, a prosecutor should formally state the objection in the presence of the jury along with a short and plain statement of the grounds for the objection. Unless otherwise directed by the court, further argument should usually be made outside the hearing of the jury.

6-7.2 Motions in Limine

A prosecutor should attempt to resolve issues relating to the admissibility of evidence prior to the swearing of the jury or, in non-jury adjudications, prior to the swearing of the first witness. Where permitted, this may be accomplished by the filing of and a hearing on a Motion in Limine. A prosecutor should also request the court to similarly resolve questions as to the admissibility of any defense evidence.

Commentary

The admissibility of evidence, exhibits, demonstrations, or argument is left to the court for determination. Prosecutors should be sufficiently acquainted with the rules of evidence so they are able to predict the admissibility of evidence to a high degree of probability.

When the prosecutor has a good faith belief that the evidence, exhibit, demonstration, or argument being offered is not admissible, he or she should object and give a short

statement of the basis for the objection. Since most, if not all, objections involve questions of law to be ruled upon by the trial court, the legal arguments are of little or no concern to the jury. Such argument may also refer to factual matters that have not, up to that point in the proceedings, been brought out by sworn testimony and which, additionally, may not be brought out and/or may be inadmissible. This should not, however, preclude the trial court from giving the jury an explanation of the basis for the objection and/or its ruling sufficient to dispel the questions that could normally arise in the minds of the jurors, so that no unfavorable inferences will be drawn by them reflecting upon a party.

In order to conserve the time of the jury, witnesses and other interested parties, the prosecutor should attempt to have questions regarding the admissibility of evidence resolved prior to trial. In addition to the savings of court time, the pre-trial rulings will also allow for more efficient pre-trial preparation and, where permitted, the appeal of adverse rulings.

8. Arguments to the Jury

6-8.1 Characterizations

In closing argument, a prosecutor should be fair and accurate in the discussion of the law, the facts, and the reasonable inferences that may be drawn from the facts.

6-8.2 Personal Opinion

In closing argument, a prosecutor should not express personal opinion regarding the justness of the cause, the credibility of a witness or the guilt of the accused, assert personal knowledge of facts in issue, or allude to any matter not admitted into evidence during the trial.

Commentary

Faced with closing argument, the final opportunity to espouse the people's theory of the case, prosecutors need to be keenly aware of the limitations on the methods available to them for that use. Closing arguments have been the ticket back to the trial court from many appellate courts that have uttered the words "prosecutorial misconduct" in relation to words uttered by the prosecutor.

These standards set forth the basic rules for guidance in constructing and delivering a closing argument. Prosecutors should become intimately familiar with his or her jurisdiction's ethical rules and appellate opinions on proper closings.